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IN THE

Supreme Court of the United States

October Term, 1982

THOMAS SHORTBULL,

Petitioner,

v.

STANLEY LOOKING ELK, et al.,

Respondent,

No. 82-161

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY

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PETITIONER'S REPLY

This is petitioner's reply brief to Respondent's Opposition brief to the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit which was docketed in this Court on July 29, 1982. Respondent's opposition brief was served on petitioner on September 10, 1982 after an extension for filing.

ARGUMENTS IN RESPONDENT'S BRIEF

Respondents have raised three arguments in their opposition brief which the petitioner will respond seperately to in this reply brief. The arguments are: (1) petitioner did not meet the requirements of a class based animus under 42 U.S.C. 1985 (3) as the Tribal Constitution requires a person to be enrolled to run for tribal office; (2) this conspiracy statute requires that the burden of proof is with the plaintiff when it involves public officials; and (3) Indians are excluded from federal court relief under 42 U.S.C. 1985 (3).

ARGUMENT 1

The District Court and the Eight Circuit Court of Appeals ruled against petitioner's meeting the class based animus under 42 U.S.C. 1985 (3) because of his classification as an NE (not enrolled), and the tribes right to determine its own membership. However, pet-

itioner argued that the NE classification was indeed an invidious classification in pages 12-15 in his writ for certiorari. Additionally, petitioner maintains that is membership began when he was born when he met the Tribal Constitutional provision for membership which states that a child of an enrolled member is a member of the Oglala Tribe under this provision:

> Article II. Section (b) All children born to any member of the Tribe who is a resident of the reservation at the time of birth of said child.

Petitioner's postion that he was a member of the Tribe was substantiated by his June 28, 1982 enrollment with no enrollment amendment to the Tribal Constitution since its adoption in 1935.

Although the petitioner was certified as a candidate for Tribal President and NEs were allowed the right to vote in the 1980 election, respondents submit in their opposition brief on page 7 that their actions were legitimate based on the Tribal Constitution's requirement that a person must be an enrolled member to run for Tribal Office.

Firstly, petitioner questions the propriety of respondents making a statement such as this when there is not one place in the Tribal Constitution in which there is reference to membership requring an enrollment or enrollment being necessary to run for office or to vote in tribal elections. The only applicable provisions in the Tribal Constitution that deal with the right to run for office and vote in Tribal elections are Article VII-Elections and Article II of the By-Laws- Qualifications of Officers.

Article VII-Elections

> Section 1. All members of the Tribe, 21 years or over, who have resided on the reservation for a period of one year immediately prior to any election shall have the right to vote.

Article II-QUALIFICATIONS OF OFFICERS

> Section 1. Any person elected as councilman must be a member of the Oglala Sioux Tribe and must be at least 25 years of age at the time of the election

Other than these two constitutional provisions,

there are no other statements in the Tribal Constitution which deal with tribal membership, the right to run for tribal office, or the right to vote in tribal election. Therefore, respondents are attempting to mislead this Court that the Tribal Constitution allows for only those who are tribally enrolled to qualify for their tribal rights. As the Tribal Constitution only refers to members not tribally enrolled members as the basis for tribal rights, petitioner reinterates his position as found in page 13 of his writ that his membership began with his birth as this is when he met the constitutional requirements of tribal membership.

As Article III Section 10 of the Tribal Constitution provides that the Tribal Council shall be the sole judge of the constitutional qualifications of its members, petitioner maintained throughout his pleadings to the Tribal Council that the Council had the authority to certify him as a candidate for Tribal President.

On January 24, 1980, the Tribal Council passed a resolution that certified petitioner as a candidate for Tribal President and NEs were allowed to vote in the 1980 election. As this resolution was never rescinded by the Tribal Council, this was the law of the Oglala Tribe. However, when respondents refused to implement this legal authority of the Tribe, this action created the exact class based animus as required in 42 U.S. C. 1985 (3) for petitioner and the NEs were a class who were deprived of their right to run for office and vote even though they were in fact legal participants in the 1980 election and by this action were deprived of their civil rights.

Petitioner would also like the Court to consider that on Indian reservations there are no political parties in tribal elections, and nothing that resembles party affliliation in a Tribal Election. It is petitioner's position that if the NEs were allowed to vote in the 1980

Primary Election that petitioner would have received many of the NE votes for he had fought for their right to vote in the Tribal election before the Tribal Council. Therefore, the denial of the NE participation was motivated by political considerations.

ARGUMENT 2

Respondents submit the case of Chase v McMasters, 573 F. 2d 1011 (1978) on the position that public officials are liable under 42 U.S.C. 1985 (3) only if (1) they knew or reasonably should have known, that their actions violated Chase's clearly established constitutional rights or (2) they took the action with malicious or impermissable motives of causing a deprivation of rights or other injury to Chase. Respondents state in their brief that "Shortbull has the burden of proof to show the Respondents knew their actions would violate Petitioner's constitutional Rights and further that their acts were motivated to cause a deprivation of rights

to Petitioner". However, under this case, it only requires that one of the two requirements of liablility must be met to state an action under 42 U.S.C. 1985 (3). Under Chase v McMasters, it is petitioner's position that respondents knew that their actions violated the clearly established rights of petitioner, and it is under this requirement that petitioner maintains respondents violated his and the other NEs civil rights.

Respondents submit that the Petitioner's Deposition of December 11, 1980 does not meet the requirements of liability under 42 U.S.C. 1985 (3) for he is unable to sustain such a burden of proof. Peitiioner disagrees for respondents were bound by their oaths of office to implement the laws of their Tribe, and when the Tribal Council certified petitioner as a a candidate for Tribal Presidents and NEs were allowed to vote in the 1980 election, the respondents had no discretionary authority to not

implement these laws unless the Tribal Council authority was rescinded which never happened. Therefore, respondents knowingly refused to implement the laws of the Oglala Tribe.

Additionally, in every instance that respondents provide instances of where proof was not met in Petitioner's deposition, the record will show repeatedly that petitioner maintained that the illegal conspiracy under 42 U.S.C. 1985 (3) centered around respondents not implementing the January 24the Council action which was the legal authority they were bound by.

As stated in petitioner's writ, the fault with this case may have been in a better prepared complaint. However, in Means v Wilson 522 F. 2d 833, the Eighth Circuit held "the complaint alleges all of these facts on one way or another no matter how inarfully done and states a claim under 42 U.S.C. 1985 (3)

ARGUMENT 3

Respondents argue that since there is no spe-

cific reference to Indians under 42 U.S.C. 1985 (3), that this statute does not rest jurisdiction in the federal courts to hear complaints of Indians vs Indians. Additionally, respondents argue that Santa Clara v Martinez, 436 U.S. 49 (1978) excludes Indians from all federal court relief involving Indians vs Indians.

Firstly, Indians are citizens of the United States, and as such enjoy the equal protection of federal laws unless a court decision has ruled that the particular statute is not applicable based on precedents in Indian law. As for the Eighth Circuit in which this case originated, the Court of Appeals has held that tribal members are entitled to the protection under 42 U.S.C. 1985 (3) in the case of Means v Wilson,522 F. 2d 833. Therefore, until Means v Wilson is overturned, it is still the applicable law in this case.

As for whether the Martinez decision excludes all federal court relief for tribal members,

petitioner's argument against this is found in pages 16-20 of petitioner's writ for certiorari.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, a writ of certiorari should be granted.

Respectfuly submitted,
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